United States Court of Appeals

for the Second Circuit

APPELLEE'S SUPPLEMENTAL BRIEF

To Be Argued By:
Paul V. French

Docket No. 74-2056

B

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

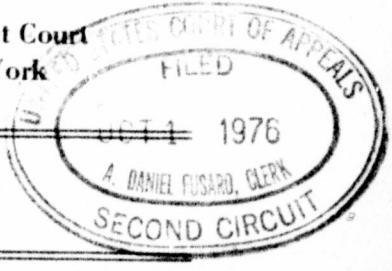
Appellee,

— against —

RICHARD PATRICK CARRIGAN and ROBERT EDWARD WHITE,

Appellants.

Appeal From The United States District Court For The Northern District of New York



Supplemental

BRIEF FOR APPELLEE

RECEIVED

SEP 7 1976

Albany, New York
United States Attorney

JAMES M. SULLIVAN, JR.
United States Attorney
Northern District of New York
Attorney for Appellee
U.S. Post Office & Court House
Albany, New York 12207

Daily Record Corporation
Rochester, New York

(8311)

Spaulding Law Printing
Syracuse, New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

— against —

RICHARD PATRICK CARRIGAN and ROBERT EDWARD WHITE,

Appellants.

Appeal From The United States District Court
For The Northern District of New York

BRIEF FOR APPELLEE

STATEMENT OF THE ISSUES

1. Were the appellants prejudiced by the joint representation of counsel?

2. Was the evidence sufficient to sustain appellants' conviction?

3. Is remand for resentencing required?

STATEMENT OF THE CASE

Procedural Background — —

This is an appeal from the judgment of the United States District Court for the Northern District of New York (the Honorable Lloyd F. MacMahon sitting by

designation) rendered on July 19, 1974, convicting appellants of violations of Title 18, United States Code, Sections 2314 and 2, the interstate transportation and aiding and abetting the transportation of stolen goods after a jury trial.

Both appellants were indicted on March 13, 1974, in a single one-count Indictment charging them each with violations of Title 18, United States Code, Sections 2314 and 2 and were tried together resulting in a jury verdict of guilty as charged on June 17, 1974. Both appellants were sentenced on July 19, 1974, to serve a term of eight years in prison.

ARGUMENT

POINT I

JOINT REPRESENTATION BY THE SAME LAWYER OF BOTH APPELLANTS WAS NOT ERROR.

The only significant issue raised by appellants is that pertaining to their joint representation by counsel. It is to this argument that the Government directs its attention.

Both appellants were represented by Armand Riccio, Esq., a prominent lawyer in the area where appellants resided and experienced in the trial of criminal cases. The appellants had retained Mr. Riccio to represent them at the outset of the case. This same lawyer had represented both appellants on other matters including criminal charges prior to the instant case. As a matter of fact, the appellant Carrigan stated to F.B.I. Agents at the time of his arrest that the sum of $1,169. in his possession was obtained from his lawyer Armand Riccio. Further, the appellant White two weeks before the trial

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

DOCKET NO. 74-2056

RICHARD PATRICK CARRIGAN, and
ROBERT EDWARD WHITE,
Appellants.

STATEMENT OF FACTS

Sometime during the night of March 7-8, 1974, the M. Frenville Company, located at Gloversville, New York, was burglarized of a quantity of leather goods which was recovered at a warehouse in Haverhill, Massachusetts, on March 9, 1974.

The Government in order to prove the elements of the offense charged in the one-count Indictment against appellants produced eight witnesses and eleven exhibits.

The witness Greenberg testified that approximately a month prior to the leather burglary he was contacted by an unidentified man who intimidated him for the purpose of having him become involved in the sale of leather (TR., p. 21-22). He further testified that the appellant CARRIGAN and he had numerous telephone conversations subsequent to the visit

by the unidentified man concerning dealing in leather, and that he met with both appellants at the Marriott Inn in Boston, Massachusetts, about three weeks before the burglary. He identified both appellants in Court (TR., p. 24-25). The witness further testified that on March 8, 1974, he met both appellants in Haverhill, Massachusetts, for the purpose of arranging a sale of the leather goods. He testified that appellant WHITE and he unloaded a U-Haul truck loaded with leather goods at witness Zikos' warehouse (TR., p. 35). He further testified that he was paid in two checks, totaling $5,000., by witness Zikos for the leather (TR., p.37), and that he arranged cashing of the checks and gave the money to the appellants (TR., p. 38). He further testified that the appellant WHITE stated that appellants had a rough time getting the goods and could have gotten caught (TR., p. 60). Witness Zikos testified that he knew witness Greenberg and that he purchased the unfinished leather on March 8, 1974, with a down payment of $5,000. with his checks (TR., p. 67-71). He further identified appellant WHITE as being with Greenberg in the U-Haul truck at his place of business (TR., p. 68).

Witness Krup testified as to the introduction of evidence of Exhibits 3 and 4, Allegheny Airline tickets issued

in the names of the appellants for a flight from Boston to Albany on March 8, 1974, and that the tickets had been used (TR., p. 85).

Witness Serfis testified that as Manager of the M. Frenville Company that on the morning of March 8, 1974, a quantity of leather goods were stolen from his company, and that on March 9, 1974, he identified the leather at Zikos' warehouse in Haverhill, Massachusetts, (TR., p. 91) as being the same leather that was in his own warehouse on March 7, 1974. He further testified that the wholesale value of the leather goods that were stolen was $37,472.76 (TR., p. 94).

Witness Ragone testified that prior to the burglary appellant WHITE wanted him to get a truck so that they could pull a job (TR., p. 100). He further testified that he met with appellants throughout the day of March 7, 1974, and at their direction burglarized the Frenville Company (TR., p. 108). He further testified that he and witness Southwick in the truck and the appellants in a separate car drove to Massachusetts and that on March 8, 1974, the truck containing the stolen leather was taken by appellants (TR., p. 114) and later returned to them in Massachusetts (TR., p. 114-115).

Witness Southwick testified similarly to witness Ragone that he had burglarized the Frenville warehouse at the

direction of appellants (TR., p. 153) and had driven in the truck from Gloversville, New York, to Howard Johnson's in Massachusetts, with witness Ragone (TR., p. 156).

Witness Dumaine, F.B.I. Agent, testified that he had advised appellant WHITE of his rights on March 9, 1974. He further testified that WHITE related his whereabouts on March 7 and March 8, all occurring in New York State and in and around Schenectady, New York (TR., p. 184-185).

Witness Jeanne M. White (a cousin of appellant W testified that she loaned her car to appellant WHITE corre witness Ragone as to the use of Jean White's car (TR., p. 137-139).

On behalf of the defense, appellant CARRIGAN tes at length (TR., p. 190-240). The gist of his testimony wa he and appellant WHITE took part in most of the events as outlined in the Government's case with the exception of th burglary, and that he did not know the leather was stolen. He further testified that he and appellant WHITE were only a favor for Ragone to help him sell the leather (TR., p. CARRIGAN testified that he and appellant WHITE received $ each (TR., p. 210, 236).

in the instant case was successfully represented by Mr. Riccio in a criminal trial in Rensselaer County Court which resulted in his acquittal. At no time throughout the case did either appellant claim any dissatisfaction with their counsel nor was any possible conflict of interest brought to the Court's attention. It was only after the trial that Mr. Riccio indicated to the Court Clerk that his clients were now indigent which resulted in his assignment for the purpose of receiving some compensation for his representation. It is on this appeal the appellants for the first time through their appointed counsel urged reversal claiming they were prejudiced by this joint representation.

The Courts have stated that a defendant's right to counsel of their own choosing should not be unduly interfered with by the Court. See United States v. Sheiner, 410 F.2d 337 (2nd Cir., 1969). Further, when a trial results in a guilty verdict based on overwhelming evidence of appellants' guilt their only recourse is to attack their attorney in hopes that a reversal may be obtained. See United States v. Wisniewski, 478 F.2d 274, 281, 284 (2nd Cir., 1973).

It appears from a review of the cases cited by appellants on this issue that the better practice in an effort to avoid the issue on appeal would be for the trial Court to conduct a hearing between counsel and defendants to determine prior to trial whether there is anticipated a conflict of interest arising from the joint representation. Concededly, this was not done, but if such a hearing had been held, without getting into the strategy of the defense, it would not have changed the situation.

In United States v. Lovano, 420 F.2d 769 (2nd Cir., 1970), the Court says:

> "The rule in this circuit is that some specific instance of prejudice, some real conflict of

> interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel."

The Government argues that a careful review of the record fails to show any such specific prejudice or real conflict of interest. The Indictment contained only one count charging each appellant with the interstate transportation and aiding and abetting the transportation of the stolen leather. The proof by the Government shows almost equal participation by both appellants throughout the entire occurrence. Certainly said proof does not now nor would not then indicate to the Court any conflict of interest or prejudice. The mere fact the evidence is damaging or harmful to the defense is not prejudice. It is obvious from the Government's proof at the trial that separate counsel could not have prevented the strong evidence against each defendant as to their involvement in this illegal transaction. There is no way any lawyer, short of perjury or subornation thereof, could have extricated appellant White from the predicament he placed himself in. Special Agent Dumaine's testimony that appellant White said he was in Schenectady, New York, at the time of the crime in light of direct testimony of witnesses Greenberg, Zikos, Ragone, Southwick, and the airplane tickets placing him in Boston is too much to expect Mr. Riccio or any separate experienced criminal lawyer to overcome.

Most of the cases cited by appellants on this issue are concerned with multiple count Indictments including conspiracy counts involving a real conflict of interest apparent to both defense counsel, the Court and defendants with the exception of United States v. DeBerry, 487 F.2d 448 (2nd Cir., 1973), and upon which the appellants are relying. The Government contends that the DeBerry case, supra, is clearly distinguishable on its facts. In that case as in the instant case one

defendant took the stand and the other did not. The significant difference between the two cases is that in the DeBerry case the defendant who took the stand incriminated the co-defendant which the Court properly held to be prejudicial. In the instant case it was the strategy of the defense to put the appellant Carrigan on the stand and minimize both defendants' participation in the incident. Had appellant White been represented by separate counsel any cross examination by him of Carrigan would be minimal or run the risk of implicating both defendants even further. To put the appellant White on the stand in an effort to explain the obvious lie to the F.B.I. that he was in Schenectady could only make a bad situation worse. Thus, Mr. Riccio's strategy not to emphasize in any way to the jury Agent Dumaine's testimony in light of all the proof placing appellant White in Boston was the only sound recourse available to him.

In Morgan v. United States, 396 F.2d 110 (2nd Cir., 1968), the Second Circuit stated:

> "...where two defendants are represented by the same attorney, one defendant elects to take the stand and the other chooses not to, the possible prejudice in the eyes of the jury to the defendant who does not take the stand is almost inescapable."

An exception to this position is as in the instant case where the one defendant takes the stand and testifies consistently as to the innocence of both defendants, and where sound tactical reasons exist for not calling the other defendant whose credibility has already been impeached by the Government's case in chief.

Thus, the Government contends that the record reveals no prejudice to either appellants from the joint representation and accordingly, the appellants have not been denied the effective assistance of counsel.

POINT II

THE EVIDENCE AGAINST BOTH APPELLANTS OVERWHELMINGLY SUSTAINS THEIR CONVICTION.

Appellant White argues that their conviction is based primarily on accomplice's testimony. The short answer to this argument is that the record reveals substantial corroboration of the accomplice's testimony. In any event, the rule in this Circuit is that a conviction can be sustained on the testimony of an accomplice alone. United States v. Marks, Jr., 368 F.2d 566 (2nd Cir., 1966), cert. denied, 386 U.S. 933 (967).

In essence the appellants' argument is thus reduced to the sufficiency of the Court's charge to the jury on the accomplice's testimony. A reading of the Court's charge to the jury indicates that the standard charge as to accomplice's testimony was given, and no objection or exception as to that charge was made by appellants' counsel. United States v. Projansky, 465 F.2d 123, 137 (2nd Cir., 1972); United States v. Bellamy, 436 F.2d 542 (2nd Cir., 1971), cert. denied, 402 U.S. 929.

Accordingly, the Government submits that the argument that the evidence is insufficient by virtue of the fact that much of the evidence was elicited from the testimony of accomplices is not supported by law.

The secondary issue raised on this point by appellant White pertaining to the possible coerced testimony from the witness Southwick is equally not supported by law.

It was during the cross examination of the witness Southwick that the Government first learned that the witness claimed he was beaten by the State Police prior to his statement. The defense counsel, the Court, and the prosecutor fully explored the issue as to whether the

beating, if it did occur, in any way changed the truthfulness of the witness's statement or testimony. The record clearly indicates that both the statement and the testimony by witness Southwick as to appellants' involvement was the truth (TR. 175, 177). The appellants could not seek to exclude the testimony of the witness Southwick on the ground of extra-judicial threats or coercion. Such testimony even if coerced was admissible since appellants were afforded the opportunity to attack the veracity of the witness. United States v. Portelli, 469 F.2d 1239 (2nd Cir., 1972); Long v. United States, 360 F.2d 829 (D.C.C.A., 1966).

POINT III

REMAND FOR RESENTENCING IS NOT REQUIRED.

Appellant Carrigan argues that his sentence was invalid as a denial of due process because the sentencing judge relied upon materially false assumptions with respect to appellant's prior criminal record.

The basis for this argument is the simple fact that the pre-sentence report contained a copy of a criminal record report obtained from the Federal Bureau of Investigation, which indicated eight charges against the appellant, reflecting conviction as to only one charge, and no disposition as to the other seven charges.

Appellant alleges that of those seven charges, four were dismissed, two resulted in acquittals and that he had never been arrested on the remaining charge.

If the sentencing Court had assumed that the appellant had been convicted of all of these seven charges, his argument for resentencing would be meritorious, however, as appellant points out the arrest record reflected that five of the charges were still pending at the time of sentencing, and accordingly an experienced jurist, would

never have made the assumption that conviction would have resulted in all of the pending charges.

Moreover, an experienced jurist, such as the sentencing Judge in this case, must have seen and had experience with literally hundreds of such F.B.I. criminal record reports, and would surely know that where no disposition is reflected that it is likely that conviction was not obtained or that the case had been dismissed or the charge reduced or disposed of in some other manner.

Appellant's assumption that the sentencing Judge was misled by the F.B.I. criminal record report is therefore factually unfounded. Moreover, appellant assumes that the only evidence of his prior criminal activity in the presentence report is the F.B.I. criminal record, which is equally unfounded. The procedure of the probation authorities, in view of the fact that no disposition is reflected as to those charges, would be to further investigate those matters.

The results of that further inquiry are not known since the Government is not privy to the presentence report, and appellant's trial counsel apparently did not request to examine the report, pursuant to Rule 32(c)(3), which would preclude disclosure after sentencing to avoid the type of collateral attack made here, where the defendant is not satisfied with the sentence imposed.

The mere fact that evidence of habitual misconduct did not result in conviction does not preclude a sentencing Court from considering such information when imposing sentence. United States v. Malcolm, 432 F.2d 809, 816 (2nd Cir., 1970). A sentencing Court has wide discretion in the type and sources of information he may use in imposing sentence. Williams v. People of the State of New York, 337 U.S. 241, 69 S.Ct. 1079, 1082-1085 (1949).

The supposition from the Court's language that the appellant had a "long criminal record" meant that the Court was misled into believing that the appellant had been convicted of all the reported charges is unfounded. The Court would know that this was not the case, but could properly have concluded that the appellant had a past history of criminal activity.

The Government therefore submits that the appellant has failed to show that the sentencing Court had relied upon materially false assumptions with respect to appellant's criminal record when imposing sentence, and accordingly remand for resentencing is not required.

CONCLUSION

THE CONVICTION AND SENTENCE SHOULD BE AFFIRMED.

Respectfully submitted,

JAMES M. SULLIVAN, JR.
United States Attorney
Northern District of New York
Attorney for Appellee

Paul V. French
Assistant U.S. Attorney
(Of Counsel)